



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. FRA-2019-0071, Notice No. 2]

RIN 2130-AC80

Control of Alcohol and Drug Use: Coverage of Mechanical Employees and Miscellaneous Amendments

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: As mandated by the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act or Act), FRA is expanding the scope of its alcohol and drug regulation to cover mechanical employees. This rule clarifies who FRA considers a mechanical employee for regulatory purposes, and adopts proposed technical amendments.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: *Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

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I. Executive Summary

In Section 8102(a) of the SUPPORT Act,¹ Congress mandated FRA (as the Secretary of Transportation's delegate) include "all employees of railroad carriers who perform mechanical activities" (MECH employee(s)) in its alcohol and drug regulation, 49 CFR part 219. In section 8102(b) of the Act, Congress directed FRA to define mechanical activities for purposes of part 219 coverage. On January 8, 2021, FRA published a Notice of Proposed Rulemaking (NPRM) in response to this mandate.² FRA received comments on the NPRM from four organizations (including one joint filing) and 12 individuals. This final rule addresses those comments and amends part 219, as proposed, by defining a MECH employee as any employee who, on behalf of a railroad, performs mechanical tests or inspections required by the following FRA regulations: Railroad Freight Car Safety Standards (49 CFR part 215), Rear End Marking Device – Passenger, Commuter and Freight Trains (49 CFR part 221), Railroad Locomotive Safety Standards (49 CFR part 229), Steam Locomotive Inspection and Maintenance Standards (49 CFR part 230), Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices (49 CFR part 232), and Passenger Equipment Safety Standards (49 CFR part 238). In addition, as discussed in the Section-by-Section Analysis, the definition also includes any such employee who performs mechanical tests or inspections required by the Texas Central Railroad High-Speed Rail Safety Standards (49 CFR part 299). Defining a MECH employee as one who performs these required tests or inspections properly limits part 219 coverage to those mechanical

¹ Pub. L. 115-271, Oct. 24, 2018.

² 86 FR 1418.

department employees who perform functions that most directly affect safety. An employee who conducts tests or inspections provides the last safety check on railroad rolling equipment before its operation. Final tests or inspections, if not performed or if performed improperly, could lead to single points of failure in the mechanical safety process. An employee who performs a Federally mandated “last look” at the equipment, whether or not it has undergone any repair, maintenance, or servicing work, is responsible for ensuring that the equipment is compliant with Federal regulations and safe for use.

By amending the term “regulated employee” to include MECH employees, FRA is making them subject to all part 219 prohibitions and testing (pre-employment, random, post-accident toxicological (PAT), reasonable suspicion, return-to-duty, and follow-up). Railroads, contractors, and subcontractors must comply with the same reporting, recordkeeping, and referral requirements for MECH employees, as for covered service and MOW employees.

In addition to changes to part 219 directly related to the addition of MECH employees, this final rule also makes other changes to part 219, as proposed in the NPRM.

FRA has analyzed the economic impact of this final rule. FRA estimated the costs associated with random testing, reasonable cause/reasonable suspicion testing, pre-employment drug testing, and Government administrative costs.³ As shown in the following table, over the 10-year period of analysis, the final rule will result in total costs of approximately \$10.7 million (Present Value (PV) 7%).

Total 10-Year Costs⁴

³ The final rule will not create new costs associated with PAT testing for mechanical employees as they are already subject to part 219 PAT requirements.

⁴ Note: In this and subsequent tables, numbers may not add due to rounding.

Category	Total Cost, 7 Percent (\$)	Total Cost, 3 Percent (\$)	Annualized Cost, 7 Percent (\$)	Annualized Cost, 3 Percent (\$)
Pre-Employment	1,621,930	1,896,210	230,926	222,294
Random Testing	7,987,551	9,038,433	1,137,248	1,059,580
Reasonable Cause and Reasonable Suspicion	261,670	305,921	37,256	35,863
Government Administrative Cost	866,431	1,012,950	123,360	118,749
Total	10,737,582	12,253,514	1,528,790	1,436,486

The benefits of the final rule will come from reducing the number of mechanical employees who have a substance use disorder (SUD). FRA has determined that testing programs provide a deterrent effect to the misuse of alcohol and use of illicit drugs. This deterrence will reduce the number of existing mechanical employees with an SUD. Employee SUDs have an array of associated costs, including lost productivity, absenteeism, low morale, increased illness, and accidents. The deterrent effect of testing will induce mechanical employees with an SUD to modify their behavior with regard to the misuse of alcohol and/or use of illicit drugs. Pre-employment drug testing will prevent individuals with SUDs from being hired as mechanical employees. Random testing and reasonable cause/suspicion testing will allow railroads to identify mechanical employees with SUDs so that they can address those safety issues through rehabilitation or termination of employment.

As shown in the following table, over a 10-year period of analysis, the final rule will result in total benefits of \$41.0 million (PV 7%).

Total 10-Year Benefits

Category	Total Benefit, 7 Percent (\$)	Total Benefit, 3 Percent (\$)	Annualized Benefit, 7 Percent (\$)	Annualized Benefit, 3 Percent (\$)
Deterrent Effect	37,732,478	44,113,296	5,372,256	5,171,424
Pre-Employment	1,759,972	2,096,798	250,580	245,809
Random Testing	1,251,224	1,432,169	178,146	167,894

Reasonable Cause and Reasonable Suspicion	209,520	249,619	29,831	29,263
Total	40,953,195	47,891,881	5,830,814	5,614,390

II. Discussion of General Comments and Conclusions

FRA received comments from 12 individuals and 4 organizations in response to the NPRM. While FRA has considered all of the comments submitted, FRA is not identifying comments from individuals in the discussion below as they were generally supportive of the rule or raised unrelated issues outside of its scope such as the opioid epidemic and marijuana legalization.

The American Public Transportation Association (APTA), the National Transportation Safety Board (NTSB), and in a joint submission, the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA), submitted comments on the NPRM. Rail labor did not comment on FRA's proposal.

A. *FRA's Proposed Mechanical Employee Definition*

1. Summary

A common thread among the railroad commenters was that FRA should expand its proposed MECH employee definition to include all mechanical department employees, without qualifications or limitations on the functions or duties these employees perform. APTA supported the addition of employees who repair, service, and maintain railroad rolling equipment, while the NTSB reiterated Safety Recommendation R-08-7, which advocates coverage of all employees who perform safety-sensitive functions, as defined in § 209.303. FRA will address the APTA and NTSB comments below.

AAR/ASLRRA asserted that FRA should include all employees who perform mechanical duties involving railroad rolling equipment in the definition of MECH

employee, stating that other FRA safety regulations, such as training standards (49 CFR part 243) and blue signal protection (49 CFR part 218), define mechanical employees to include those who perform repair, service, and maintenance functions. AAR had submitted a petition for rulemaking requesting part 219 coverage of mechanical employees in 2018.⁵

AAR/ASLRRA also stated that employees who perform repair, service, and maintenance functions have the same risk exposure as employees who inspect and test rolling equipment, as they also work on, under or between rolling equipment. Moreover, employees who fuel locomotives, replenish engine oils and water, clean and/or supply locomotives, check car lading, and load/unload freight cars, perform work with and around railroad rolling equipment. According to AAR/ASLRRA, both groups are subject to personal injury if impaired while on-duty, and have the potential to cause safety-related accidents and incidents.

Finally, while laborers and hostlers who operate locomotives are already regulated employees under part 219, AAR/ASLRRA suggested that FRA consider them MECH employees even if railroads later decide to remove their locomotive operation duties, because they would continue to be exposed to the risks of working with and around rolling stock.

FRA is not persuaded that this rule should anticipate speculative railroad work policies. And, as discussed further below, although the purpose of part 219 in general, and random testing in particular, is to encourage safety by deterring workplace substance abuse, it is not an employee safety rule.

Moreover, if FRA were to include every employee who performs mechanical activities without qualifying distinctions, part 219 would cover employees whose tasks are too attenuated from rail safety to constitute a direct risk, such as employees who

⁵ 86 FR 1419.

fuel, clean, and supply locomotives, or retrieve and fulfill parts orders. As discussed below, FRA has both 4th Amendment and programmatic concerns about subjecting these employees to random testing.

2. Fourth Amendment Implications

In *Skinner v. Railway Labor Executives' Association*,⁶ the Supreme Court held that the collection and analysis of biological samples for FRA mandated or authorized drug and alcohol tests are 4th Amendment searches. The Court, in upholding FRA PAT and reasonable suspicion testing, found both searches reasonable because FRA's compelling interest in rail safety outweighed the privacy interests of railroad employees performing safety-sensitive tasks.

Although *Skinner* did not address the Constitutionality of random testing, several months later, a decision by the U.S. District Court for the District of Columbia reinforced that a direct safety nexus was crucial to sustain the workplace testing of employees. In *Transportation Institute, et al. v. United States Coast Guard, et al.*,⁷ the Court enjoined implementation of the random testing part of a U.S. Coast Guard final rule⁸ that established its workplace testing program. The Coast Guard had required, with limited exceptions, all crewmembers serving on board a commercial vessel to be subject to random testing, to include not only those employees whose ordinary duties directly affected the safety of vessel navigation and operations, but also any who could be assigned safety-critical tasks in an emergency. In holding the program was over-inclusive and violative of the 4th Amendment, the Court found that the Coast Guard had impermissibly covered maintainers, cooks, messmen, and other employees whose tasks were insufficiently tied to safety to justify their inclusion in random testing. The Coast Guard, in lieu of appealing the decision, suspended implementation of its random

⁶ 489 U.S. 602 (1989).

⁷ 727 F. Supp. 648 (D.D.C. 1989).

⁸ 53 FR 47064, Nov. 21, 1988.

testing program and published another final rule which narrowed the focus of its random testing program to employees who performed functions directly affecting the safety of vessel operations or the emergency safety of passengers.⁹

Similarly, the expansion of the MECH employee definition to include all employees who perform mechanical activities would add mechanical department employees who, as examples, fuel, clean, and supply locomotives, or retrieve and fulfill parts orders, as noted above. The addition of these employees, and others who perform mechanical activities that do not directly affect safety, would impermissibly broaden the scope of part 219 beyond the workplace testing limits set by these decisions.

3. Decrease in Random Testing Deterrence

The inclusion of employees who repair, service, or maintain rail rolling stock would lessen the impact of random testing, FRA's strongest deterrence tool against railroad workplace substance abuse. The FRA random drug positive rate has declined from a high of 0.94% in 2004 to 0.51% in 2020, even with the addition of maintenance-of-way (MOW) activities to regulated service in 2017 and synthetic opioid pain medications to the testing panel in 2018. FRA has consistently refined its random testing pool design requirements to improve the probability of a railroad selecting and testing employees who directly affect safety. For example, a railroad must periodically review its random testing pools to detect and remove employees who perform regulated service on a de minimis (less than quarterly) basis. In its final rule adding MOW employees to part 219 coverage,¹⁰ FRA specified pool size minimums and other requirements to improve the efficacy of random testing.

Adoption of the commenters' requested definition would add thousands of mechanical department employees, such as locomotive servicing employees and shop

⁹ 56 FR 31034, July 8, 1991.

¹⁰ 81 FR 37894, June 10, 2016.

laborers, who perform functions only tangentially related to rail safety. The inclusion of these employees would “dilute” mechanical employee pools by adding random testing selections that would displace those of employees who directly impact rail safety.

4. Consistency with the SUPPORT Act

AAR/ASLRRA, APTA, and NTSB asserted that FRA’s proposed definition, by covering some, but not all, mechanical department employees was inconsistent with section 8102 of the Act. FRA notes, however, that as a corollary to section 8102(a)’s mandate to cover MECH employees, section 8102(b) authorized FRA to define mechanical activities. Had Congress intended FRA to cover mechanical department employees without restrictions, the Act would not have qualified section 8102(a)’s mandate with section 8102(b)’s direction for FRA to determine, and thus limit, which functions constitute mechanical activities for purposes of part 219 coverage. Under the Act’s own terms, the final rule complies with both subsections of section 8102.

5. Consistency with the MOW Employee Definition

APTA suggested an alternate definition, under which a MECH employee would be “[a]ny employee of a railroad whose duties include inspection, testing, maintenance or repair of railroad rolling equipment or its components.” As explanation, APTA stated that: this language would make FRA’s MECH and MOW employee definitions more consistent; substituting “whose duties include” for “performs” would remove the need to track employees who perform tests and inspections for purposes of determining random testing pool inclusion; and poor performance of maintenance and repairs, which it asserts are safety-critical tasks, could go undetected during daily and periodic inspections and tests. AAR/ASLRRA also commented that FRA’s proposed treatment of MECH employees differed from its treatment of MOW employees who, as “roadway workers,” are defined in § 214.7 to include employees who maintain or repair railroad track and other structures.

Yet, the Act neither addresses, nor requires, consistency between part 219's MECH employee and MOW employee definitions. In its final rule incorporating MOW employees,¹¹ FRA adopted the roadway worker definition in § 214.7 of its Railroad Workplace Safety regulation, Roadway Worker Protection (subpart C of 49 CFR part 214). FRA adopted this longstanding definition because the railroad industry was already familiar with its meaning and application. In contrast, there is no pre-existing definition of MECH employee, and FRA is authorized to define the term as it deems appropriate.

As FRA states in § 219.1, the purpose of its alcohol and drug regulation is to prevent accidents and casualties related to substance abuse in rail operations. In § 214.301, however, FRA states that the purpose of its roadway worker protection regulation is, as implied by its subpart's heading, to prevent moving equipment-related accidents and casualties to roadway workers. Part 219, like all workplace testing rules, focuses on deterrence and detection of on-duty use and impairment, to improve the safety of rail employees generally, while part 214 focuses on operating rules to improve the safety of roadway employees specifically. FRA's mechanical regulations (e.g., part 215) set minimum Federal safety standards for rail equipment. While these rules specify equipment requirements that promote a safe working environment for all employees, their stated purposes do not specifically include MECH employee safety.

FRA is expanding the scope of part 219, a workplace safety rule, to include MECH employees who work with railroad equipment subject to numerous workplace safety rules. Subpart C of part 214's stated purpose, to protect the safety of an individual category of employees, is unique to roadway workers/MOW employees. Aside from their consecutive incorporation as non-covered service employee categories, there is no

¹¹ 81 FR 47894.

equivalency between MOW and MECH employees, and no reason to make their definitions consistent. In addition, part 214 and FRA's mechanical regulations do not have the burden of balancing 4th Amendment rights and safety that must be considered when defining a regulated service function in part 219.

6. Treatment of Employees Subject to Part 209

While pleased that FRA was proposing to expand the scope of part 219, the NTSB expressed disappointment that FRA's proposal would not satisfy Safety Recommendation R-08-7,¹² which recommends the inclusion not only of employees who repair or maintain railroad rolling equipment, but all railroad employees and agents who perform the training, testing, and supervision roles described in § 209.303 (subpart D of 49 CFR part 209, Railroad Safety Enforcement Procedures). However, the NTSB acknowledged that it may be appropriate, on a limited basis, to exempt certain employees who perform only specific minor repair or maintenance tasks from the MECH employee definition in the final rule, following the example of paragraph (1)(ii) of the proposed MECH employee definition.

As further background, on April 10, 2008, the NTSB issued Safety Recommendations R-08-5 through R-08-7 to FRA.¹³ At that time, part 219 coverage extended only to covered service employees. All three recommendations stemmed from a January 9, 2007, Massachusetts Bay Transportation Authority accident, which killed two MOW employees and seriously injured two others. (FRA discussed this accident and its corresponding NTSB accident report (NTSB RAR-08/01¹⁴) in its MOW rulemaking.¹⁵) The NTSB stated:

The FRA data from postaccident alcohol and drug testing indicate that maintenance-of-way employees are about three times more likely to have positive test results than are covered employees (19.23 percent vs. 6.56 percent).

¹² <https://data.nts.gov/carol-main-public/sr-details/R-08-007>.

¹³ https://www.nts.gov/safety/safety-recs/recletters/R08_05_07.pdf.

¹⁴ <https://www.nts.gov/investigations/AccidentReports/Pages/RAR0801.aspx>.

¹⁵ 79 FR 43830 (July 28, 2014), 81 FR 37894 (June 10, 2016).

This difference is attributable to the deterrent value of the FRA's random testing program to which covered employees are subject but maintenance-of-way employees are not. The Safety Board concludes that the FRA's random alcohol and drug testing program has been a deterrent to alcohol and drug use by covered employees, as evidenced by their significantly lower positive rate in postaccident tests than maintenance-of-way employees who are not subject to random testing. Limiting the applicability of alcohol and drug testing to only "hours-of-service" employees restricts the potential effectiveness of the FRA rule to control alcohol and drug use. All employees and agents in safety-sensitive positions should be subject to all the provisions of 49 *Code of Federal Regulations* (CFR) Part 219. Therefore, the Safety Board recommends that the FRA revise the definition of "covered employee" under 49 CFR Part 219 for purposes of Congressionally mandated alcohol and controlled substances testing programs to encompass all employees and agents performing safety-sensitive functions, as described in 49 CFR 209.301 and 209.303.

In § 209.303, FRA identified the individuals in the rail industry who would be subject to disqualification by specifying the functions these individuals performed.¹⁶ While § 209.303 includes individuals who train and test employees, individuals who conduct FRA-mandated training and testing may do so without approaching railroad track, equipment, or roadbed. Moreover, part 209 is a rule of general applicability, which lists the individuals subject to FRA's individual liability, disqualification, and subpoena powers. The NTSB does not provide a direct correlation between the functions identified for purposes of disqualification and individual liability and the functions identified for purposes of random alcohol or drug testing. Without further justification from the NTSB, it is unclear how the performance of the excluded § 209.303 functions impacts rail safety, or why FRA should include all employees subject to § 209.303 under part 219.

APTA also recommended that FRA include foremen, general foremen, supervisors, general supervisors, and others who directly supervise or oversee employees performing mechanical activities. Because FRA's MECH employee definition determines coverage by function, not title, these employees would be performing

¹⁶ 54 FR 48924, Oct. 18, 1989, implementing in part the Rail Safety Improvement Act of 1988, Pub. L. 100-342 (June 22, 1988).

regulated service if they sign-off on inspections, or test safety-critical systems or components.

B. *Pre-employment Testing*

APTA requested that FRA exempt MECH employees from the required two-year retrospective alcohol and drug records check for new and first-time transfers in § 40.25 of DOT's Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR part 40, cross-referenced in part 219 in § 219.701(a)). Section 40.25 requires an employer to check an employee's previous two years of DOT drug and alcohol testing results within 30 days of when the employee performs safety-sensitive duties for that employer for the first time. FRA cannot grant an exemption from § 40.25 for MECH employees, which APTA acknowledged is a requirement set by DOT's Office of Drug and Alcohol Policy and Compliance (ODAPC). Section 40.5 authorizes only ODAPC and the DOT Office of General Counsel to issue official interpretations of part 40.

FRA is, however, exempting current MECH employees from pre-employment drug testing. Only MECH employees hired by a railroad, or a railroad contractor or subcontractor, after the effective date of this final rule will be required to have a negative DOT pre-employment drug test before performing regulated service for the first time. As with MOW employees, this exemption applies only so long as the MECH employee continues to perform work for the same DOT-regulated employer. An initially exempted MECH employee must have a negative DOT pre-employment drug test result before performing regulated service for a different or additional DOT-regulated employer.

Moreover, consistent with part 219's treatment of MOW employees, FRA is not requiring a contractor or subcontractor employee who performs MECH activities for multiple railroads to have a negative Federal pre-employment drug test result for each railroad, provided that the contractor or subcontractor employee has a negative Federal

pre-employment drug test result on file with the contractor who is his or her direct employer.

C. *Initial Mechanical Employee Annual Random Testing Rates*

FRA is setting the initial minimum annual random testing rates for MECH employees at 50 percent for drugs and 25 percent for alcohol, as it did for MOW and covered service employees when they first became subject to FRA testing. *See* § 219.625(c). FRA will create an independent Management Information System (MIS) database of industry-wide MECH employee positive and violation rates to set future minimum annual random testing rates, and will maintain its initial random testing rates for MECH employees until it has received two complete years of MIS data for this new category. An employer who is required to submit an annual MIS report may place its MECH employees in a commingled pool so long as the employer reports its results under the correct safety-sensitive category.

D. *Post-Accident Toxicological Testing*

In 2019, FRA published on its website a PAT testing application (app) which can be downloaded for free in both iOS and Android formats. The app contains guidance, among other resources, for determining whether an accident or incident qualifies as a PAT testing event and, if it does, which employees should be tested. FRA had proposed to remove appendix B, which designates its PAT testing laboratory, and appendix C, which contains its PAT specimen collection procedures, from part 219, in favor of making the information contained in both appendices kept in traditional hardcopy form in the actual testing kits and available on its app, where PAT guidance is already available.

AAR/ASLRRA asserted that appendix C should remain in part 219 because railroads are responsible for compliance with its instructions and procedures. FRA notes that a railroad representative is unlikely to consult appendix C until a PAT testing event has occurred, and PAT testing kits will, as always, contain up-to-date and accurate

reference copies of information otherwise contained in both appendices. Furthermore, an on-site supervisor conducting a preliminary field accident investigation can readily access the information contained in (former) appendix C on FRA's app, which is intended to be a one-stop resource for information on PAT determinations and collections.

AAR/ASLRRA also asked how FRA will notify railroads of future changes to the information otherwise contained in (former) appendices B and C. FRA will announce these changes on its drug and alcohol page, at <https://railroads.dot.gov/divisions/partnerships-programs/drug-and-alcohol>, and in its app. In addition, FRA maintains an individual inventory number for each PAT testing box it has issued, and will distribute updates to box holders (primarily railroad DERs (Designated Employee Representatives)) as necessary as it has done in the past. For example, all box holders will automatically receive new mailing labels upon FRA's selection of a different contracted PAT testing laboratory.

AAR/ASLRRA requested that FRA add PAT testing protocols specifically to address the PAT testing of MECH employees, noting that unlike other regulated employees who have real-time involvement with railroad accidents, MECH employees frequently perform their functions well in advance of a qualifying event. This is unnecessary. FRA's requirements for PAT drug testing to be conducted within four hours of an event, and no later than 24 hours after its occurrence, apply to all PAT testing events. If a railroad is unable to determine that a MECH employee may have contributed to a PAT testing event's cause or severity within those time limits, the railroad is prohibited from PAT testing the employee involved. FRA is not revising its PAT testing protocols. Further, as discussed below, the tracing back of repair and servicing records, beyond the mechanical test or inspection point, would make PAT testing of the employees who performed these functions unlikely.

E. *Effective Date of Final Rule and Timetable for Submitting Random Testing Plans for MECH Employees*

Noting that FRA had allowed 12 months for implementation of the MOW rule, APTA requested a minimum period of 18-24 months, asserting that due to the coronavirus pandemic, railroads need more time to meet the hiring needs required to staff the addition of MECH employees to random testing. FRA is not persuaded by this argument. Most railroads are required to conduct random testing. A railroad that does so will already have its selection method, DERs, service agents, and other program requirements and structures in place, so that the addition of one or more random testing pools should not require extensive hiring.

AAR/ASLRRA requested a 90-day implementation period, should FRA require railroads to submit revised or new random testing plans 30 days before the rule's effective date. FRA is meeting this requested timetable by making the rule effective 30 days after its publication, and then requiring random testing plan submissions to be submitted to FRA within 60 days after the rule becomes effective, instead of 30 days before, as proposed. Railroads may also submit random testing plans to FRA as soon as the rule becomes effective.

III. Section-by-Section Analysis

Unless discussed below, FRA is adopting, as proposed, each provision of the NPRM for which it received no comment.

Authority

FRA is amending the authority citation for part 219 to add a reference to section 8102 of the SUPPORT Act.

Subpart A—General

Section 219.3 Application

Paragraph (b)

FRA received no comments on its proposal to remove and reserve paragraph (b) in its entirety, and is adopting this amendment as proposed. Former paragraph (b)(1) is redundant with § 219.800(a), and former paragraphs (b)(2) and (3) can now be found in new paragraph (g) of § 219.800.

Paragraph (c)

FRA received no comments on its proposal to except small railroads, defined as railroads with 15 or fewer covered employees with minimal joint operations, from the reasonable cause, random testing, and employee referral requirements found respectively in subparts E, G, and K. FRA will continue to count only covered employees, and not MECH or MOW employees, to determine whether a railroad is a small railroad for purposes of this exception. FRA will also treat MECH employees the same as MOW employees for purposes of contractor compliance. As with MOW employees, a contractor's level of part 219 compliance will be determined by the size of the railroad(s) for which it performs MECH activities, not its size as a contractor. A contractor who performs MECH activities exclusively for small railroads (15 or fewer covered employees) that are excepted from full compliance with part 219 is also excepted from full compliance. Whereas, a contractor who performs MECH activities for at least one railroad that is required to be in full compliance with part 219 must also be in full compliance with part 219.

Section 219.5 Definitions

Category of regulated employee

As amended, this definition includes the categories of covered service, MOW, and MECH employees (as defined in this section). For the purposes of determining random testing rates under § 219.625, if an individual performs covered service, maintenance-of-way activities, and/or mechanical activities, he or she belongs in the

category of regulated employee that corresponds with the majority of the employee's regulated service.

Employee

FRA is amending this definition to include any individual who performs activities for a subcontractor to a railroad.

Mechanical or MECH employee

For the reasons stated above, FRA is adopting its proposal to define a MECH employee as any employee who, on behalf of a railroad, performs mechanical tests or inspections required by parts 215, 221, 229, 230, 232, or 238 of this chapter on railroad rolling equipment, or its components. In addition, the term would also include any such employee who performs mechanical tests or inspections required by the Texas Central Railroad High-Speed Rail Safety Standards (49 CFR part 299). These employees working on behalf of the Texas Central Railroad may otherwise be inadvertently excluded from the application of this rule because part 299 is a rule of particular applicability with its own requirements for mechanical tests and inspections.¹⁷ No such exclusion was intended.

Regulated employee

FRA is expanding this definition to include a MECH employee (as defined in this section) who performs regulated service (as defined in this section).

Regulated service

FRA is expanding this definition to include activities performed by a MECH employee (as defined in this section).

Rolling equipment

¹⁷ 85 FR 69731 (Nov. 3, 2020).

FRA is defining rolling equipment as locomotives, railroad cars, and one or more locomotives coupled to one or more cars, based on the definition of rolling equipment provided in FRA's Railroad Operating Practices regulation (49 CFR 218.5).

Side collision

The term "side collision" was formerly defined to mean "a collision at a turnout where one consist strikes the side of another consist." FRA had proposed to clarify this term to include collisions at switches or "highway-rail grade crossings." In this final rule, FRA is substituting "railroad crossings at grade" for its proposed addition of "highway-rail grade crossings." This change more appropriately clarifies the intent to address side collisions between train consists, not those that occur at highway-rail grade crossings between trains and highway vehicles.

Section 219.10 Penalties

As proposed, FRA is substituting the term "regulated employee" for "employee," to clarify that the requirements of this section apply to MOW, MECH, and covered employees.

Section 219.11 General Conditions for Chemical Tests

Paragraph (g)

FRA is removing references to appendices B and C.

Section 219.23 Railroad Policies

This section sets forth requirements for a railroad's Federal alcohol and drug testing policy, including requirements for railroads to provide employees educational materials explaining the requirements of this part, as well as the railroad's policies and procedures with respect to meeting those requirements.

Paragraph (a)

FRA is substituting the term "regulated employee" for "employee," to clarify that the requirements of this section apply to MOW, MECH, and covered employees.

Paragraph (c)

FRA is revising paragraph (c)(2) to require railroads to make hard copies of the required educational materials in this section available to each MECH employee for a minimum of three years after the effective date of the final rule. When FRA added MOW employees to the scope of part 219, it required railroads to make the same hard copy distribution to those employees for the same three-year period to introduce them to part 219. Because that three-year period for MOW employees has ended, existing paragraph (c)(2) has become unnecessary. FRA is therefore revising paragraph (c)(2) to address the addition of MECH employees and remove the reference to MOW employees.

Paragraph (d)(2)

FRA is amending this paragraph to specify that MECH employees are subject to the provisions in this part.

Subpart C—Post-Accident Toxicological Testing

As discussed above, MECH employees are subject to the same PAT testing requirements as covered service and MOW employees. A MECH employee must be PAT tested if a railroad representative can immediately determine, based on the best information available at the time of the decision, that the employee's improper or omitted mechanical test or inspection may have contributed to the cause or severity of a PAT-qualifying accident or incident. FRA is not revising its PAT testing protocols. The tracing back of repair and servicing records, beyond the mechanical test or inspection point, would make PAT testing of the employees who performed these functions unlikely, since PAT drug testing must be conducted within four hours of an event, and no later than 24 hours after its occurrence. The on-duty and recall provisions for MECH employees are the same as for other employee categories.

As proposed, FRA is removing appendices B and C. The name and mailing address of FRA's designated PAT laboratory (former appendix B) and instructions for

toxicological specimen collection (former appendix C) will be made available both in FRA's PAT testing kits and in its PAT testing app.

Section 219.203 Responsibilities of Railroads and Employees

Paragraph (a)

FRA is removing the reference to appendix C in this paragraph, consistent with the removal of appendix C from this part.

Paragraph (d)

FRA is eliminating the requirement for a railroad to submit a written explanation if a specimen collection is delayed for more than four hours after the occurrence of a PAT event. However, under § 219.209(b), a railroad must still provide immediate telephonic notification and submit a written follow-up report via email when it is unable to collect and provide PAT specimens to FRA.

Section 219.205 Specimen Collection and Handling

FRA is removing the references to appendices B and C in this section, consistent with the removal of these appendices from this part.

Section 219.206 FRA Access to Breath Test Results

FRA is removing the reference to appendix C, consistent with the removal of appendix C from this part.

Section 219.207 Fatality

This section contains the requirements for PAT testing in the case of an employee fatality in an accident or incident described in § 219.101.

Paragraph (c)

FRA is removing "Aviation Medical Examiners" (AMEs) from the list of professionals authorized to collect post-mortem body fluid and tissue samples from a deceased employee for FRA PAT testing.

Paragraph (d)

FRA is removing the reference to appendix C, consistent with the removal of appendix C from this part.

Section 219.211 Analysis and Follow-up

As proposed in the NPRM, FRA is amending this section to simplify and clarify its language. Additionally, FRA is requiring the submission of reports and requests under this section to be sent to FRA solely by email. Although FRA had proposed to continue to allow such reports and requests to be submitted in hard copy, while additionally allowing the flexibility of email submissions, the onset of the coronavirus disease 2019 (COVID-19) pandemic has led both FRA and its stakeholders to increasingly rely on electronic communications and submissions, which has become even clearer since issuance of the NPRM. Therefore, requiring all submissions to be made electronically under this section effectively codifies existing practice. No substantive changes are intended other than the amendments discussed below.

Paragraph (a)

FRA is removing the reference to appendix B, consistent with the removal of appendix B from this part.

Paragraph (c)

As noted, FRA is requiring an MRO to submit a report by email to an e-mail box specifically set up for receipt of MRO reports (FRA-MROletters.email@dot.gov).

Paragraph (e)

FRA is amending this paragraph to adopt its proposed clarifications and to require that an employee's response to the employee's PAT results be sent by email within 45 days of receipt to FRA-DrugAlcoholProgram.email@dot.gov.

Paragraph (i)

FRA is amending this paragraph to adopt its proposed clarifications and provide that an employee's request for a retest of PAT test specimens must be submitted by email

to FRA-DrugAlcoholProgram.email@dot.gov. The employee's request must still be submitted within the 60-day time limit and specify the railroad, accident date, and location.

Subpart E—Reasonable Cause Testing

Section 219.403 Requirements for Reasonable Cause Testing

FRA is revising the introductory paragraph of this section to clarify that a railroad that elects to conduct reasonable cause testing under FRA authority may only use the rule violations listed in paragraph (b) as bases for testing.

Paragraph (b)

FRA is removing “or other errors” from this paragraph to clarify that a railroad that chooses to conduct reasonable cause testing for rule violations under FRA authority may do so only for a rule violation specified in paragraph (b). FRA is also clarifying the intent of the proposed language of rule violation § 219.403(b)(20), for ease of understanding. No substantive changes are intended.

As proposed, FRA is adding reasonable cause testing bases specifically applicable to MECH employee functions. FRA authorizes, but does not require, reasonable cause testing, and received no comments in response to these additional rule violations, which involve common mechanical activities such as setting derails, performing brake tests, and initiating appropriate blue flag protection, as well as a rule violation for positive train control (PTC) enforcement to address PTC requirements that became applicable after the publication of the MOW rule.

Subpart F—Pre-Employment Tests

Section 219.501 Pre-employment Drug Testing

Paragraph (e)

FRA is clarifying that: (1) covered employees performing regulated service for small railroads are exempted from pre-employment drug testing only if they were

performing regulated service for the railroad before June 12, 2017; and (2) MOW employees are exempted from pre-employment drug testing only if they were performing “regulated service” for a railroad before June 12, 2017, and not just “duties” that may not have qualified as “regulated service.” Both clarifying amendments are consistent with discussion in the MOW final rule preamble, which explained that FRA was exempting employees who, before June 12, 2017, were performing MOW activities for a railroad or covered service for a small railroad.¹⁸

FRA is also exempting from pre-employment drug testing MECH employees who were performing mechanical activities for a railroad, or contractor or subcontractor of a railroad, before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

An exempted employee must have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad, on or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and on or after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** for MECH employees.

Paragraph (f)

To clarify how the proposed revisions in this section fit with the existing requirements of part 40, as discussed above, this new paragraph specifies that § 40.25 of DOT’s Workplace Testing Procedures (49 CFR part 40) applies to a MOW or MECH employee who was or would be exempted from FRA pre-employment drug testing. To comply with § 40.25, a railroad must conduct a drug and alcohol records check of a previously exempted MOW or MECH employee’s previous two years of employment within 30 days of when the employee performs regulated service for the first time.

Subpart G—Random Alcohol and Drug Testing Programs

¹⁸ 81 FR 37911 (June 10, 2016).

Section 219.605 Submission and Approval of Random Testing Plans

Paragraph (a)

Similar to the revisions made to the filing requirements of § 219.211, and to effectively codify current practice, this final rule revises this section to require a railroad to submit its random testing plan to FRA by email to FRA-DrugAlcoholProgram.email@dot.gov. The plan must include the name of the railroad or contractor in the subject line.

Paragraph (e)

FRA is amending this paragraph to subject an employee who performs MECH activities to the same random testing requirements as one who performs covered service or MOW activities. As discussed under section II.E. above, AAR/ASLRRA requested a 90-day implementation period. FRA is meeting this requested timetable by making the rule effective 30 days after its publication, and then requiring random testing plan submissions to be submitted to FRA within 60 days after the rule becomes effective. Railroads may submit random testing plans to FRA as soon as the rule becomes effective.

Each railroad or contractor or subcontractor to a railroad must submit for FRA approval or acceptance a random testing plan ensuring that each MECH employee reasonably anticipates that he or she is subject to random testing without advance warning each time the employee is on-duty and subject to performing MECH activities. A railroad can comply with its responsibility for ensuring that its MECH contractor and subcontractor employees are subject to random testing by including these contractor and subcontractor employees in its own random testing plan, or by requiring contractors and subcontractors to submit their own random testing plans to FRA for acceptance. FRA has developed model random testing plans for MOW employees and contractors that

could also serve as templates for MECH employees and contractors.¹⁹ In either case, contractors and subcontractors are also responsible for ensuring that their employees who perform MECH activities comply with the rule’s random testing requirements.

Section 219.607 Requirements for Random Testing Plans

Paragraph (c)

FRA is revising paragraph (c) of this section to reflect the application of railroad random testing plans to MECH employees, and to make other, minor clarifications.

Section 219.615 Random Testing Collections

Paragraph (e)

FRA is revising paragraph (e)(3) to state that a railroad must inform “each regulated employee” that he or she has been selected for random testing at the time the employee is notified—rather than inform “an regulated employee.” FRA does not intend this as a substantive change but merely as a clarification and grammatical correction of an existing requirement.

Section 219.617 Participation in Random Alcohol and Drug Testing

Paragraph (a)

FRA is substituting the term “regulated employee” for “employee” in paragraph (a)(3), to clarify that the requirements of this section apply to MOW, MECH, and covered employees.

Section 219.625 FRA Administrator’s Determination of Random Alcohol and Drug Testing Rates

Paragraph (c)(1)

As stated above, an employee who performs MECH activities is subject to the same random testing requirements as one who performs covered service. Formerly, this

¹⁹ A Model Railroad Contractor Compliance Plan is available on the FRA Drug and Alcohol Program web page at <https://railroads.dot.gov/divisions/partnerships-programs/drug-and-alcohol>.

paragraph authorized the Administrator to amend the minimum annual random testing rates, which are initially set at 50 percent for drugs and 25 percent for alcohol, for a new category of regulated employee after the compilation of 18 months of Management Information System (MIS) data. To allow sufficient time for the implementation of random testing by MECH contractors, FRA is requiring two consecutive, full calendar years of MIS data before the minimum annual random testing rates for this category may be lowered, as it did with both MOW and covered employees when they first became subject to random testing.

Subpart I—Annual Report

Section 219.800 Annual Reports

Paragraph (a)

FRA is clarifying that a railroad must submit summary data for its alcohol misuse and drug abuse programs in its MIS report.

Paragraph (f)

FRA is requiring a railroad to submit its annual MIS report in the appropriate separate sections for its covered employees (e.g., train, engine, signal, dispatch), MOW employees, and MECH employees.

Paragraph (g)

As proposed, FRA is moving § 219.3(b)'s annual MIS reporting requirements for contractors to this subpart to consolidate and clarify its railroad and contractor MIS reporting requirements.

Appendices B and C to Part 219

As discussed above, FRA is removing appendices B and C to this part, because these appendices duplicate information that can be found in FRA's PAT testing kits and PAT testing app. Every PAT testing kit includes the address of FRA's PAT testing laboratory and an address for mailing. For ease of reference, standard PAT testing kits

contain instructions for the collection of urine, blood and breath specimens, while fatality PAT testing shipping kits contain instructions for the post-mortem collection of body fluid and tissue specimens.

IV. Regulatory Impact and Notices

A. *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule is not a significant regulatory action within the meaning of Executive Order 12866 and DOT Order 2100.6A (Rulemaking and Guidance Procedures).²⁰ Details on the 10-year estimated costs and benefits of this rule can be found in the rule's Regulatory Impact Analysis, which FRA has prepared and placed in the docket (docket number FRA-2019-0071).

FRA is expanding the definition of regulated employee to include mechanical employees in part 219, as mandated by section 8102 of the SUPPORT Act.²¹ The final rule will subject mechanical employees to the provisions of part 219. The final rule will also include non-quantified miscellaneous amendments that will reduce reporting burdens, enhance a railroad's authority to conduct reasonable cause testing, and add clarity to part 219.

The final rule generates costs related to provisions on pre-employment, random testing, reasonable cause/reasonable suspicion testing, and Government administration. As shown in the following table, over the 10-year period of analysis, the final rule will result in a total discounted cost of approximately \$10.7 million (PV 7%).

Total 10-Year Costs

Category	Total Cost, 7 Percent (\$)	Total Cost, 3 Percent (\$)	Annualized Cost, 7 Percent (\$)	Annualized Cost, 3 Percent (\$)
Pre-Employment	1,621,930	1,896,210	230,926	222,294
Random Testing	7,987,551	9,038,433	1,137,248	1,059,580

²⁰ <https://www.transportation.gov/sites/dot.gov/files/2021-06/DOT-2100.6A-Rulemaking-and-Guidance-%28003%29.pdf>.

²¹ Pub. L. 115-271.

Reasonable Cause and Reasonable Suspicion	261,670	305,921	37,256	35,863
Government Administrative Cost	866,431	1,012,950	123,360	118,749
Total	10,737,582	12,253,514	1,528,790	1,436,486

The benefits of the final rule will come from reducing the number of mechanical employees who have an SUD. FRA has determined that testing programs provide a deterrent effect to the misuse of alcohol and illicit drugs. This deterrence will reduce the number of existing mechanical employees with an SUD. Employee SUDs have an array of associated costs, including lost productivity, absenteeism, low morale, increased illness, and accidents. The deterrent effect of testing will induce mechanical employees with an SUD to modify their behavior with regard to the misuse of alcohol and/or use drugs. Pre-employment drug testing will help prevent individuals with SUDs from being hired as mechanical employees. Random testing and reasonable cause/suspicion testing will help railroads identify mechanical employees with SUDs so that they can mitigate those issues through rehabilitation or termination of employment.

Over a 10-year period of analysis, this analysis estimates the final rule's benefits by multiplying the reduction in the number of employee work years that mechanical employees with an SUD are employed (17,036 employee work years) by the annual cost of having a mechanical employee with an SUD (\$3,200) on the payroll. As shown in the following table, over a 10-year period of analysis, the final rule will result in total benefits of approximately \$41.0 million (PV 7%).

Total 10-Year Benefits

Category	Total Benefit, 7 Percent (\$)	Total Benefit, 3 Percent (\$)	Annualized Benefit, 7 Percent (\$)	Annualized Benefit, 3 Percent (\$)
Deterrent Effect	37,732,478	44,113,296	5,372,256	5,171,424
Pre-Employment	1,759,972	2,096,798	250,580	245,809
Random Testing	1,251,224	1,432,169	178,146	167,894

Reasonable Cause and Reasonable Suspicion	209,520	249,619	29,831	29,263
Total	40,953,195	47,891,881	5,830,814	5,614,390

B. Regulatory Flexibility Act and Executive Order 13272; Certification

The Regulatory Flexibility Act of 1980 ((RFA) 5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. When an agency issues a rulemaking proposal, the RFA requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.”²² Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Out of an abundance of caution, FRA prepared an initial regulatory flexibility analysis (IRFA) to accompany the NPRM, which noted no expected significant economic impact on a substantial number of small entities; no comments were received on this analysis.

In this final rule, FRA is amending part 219 to include mechanical employees. Drug and alcohol testing will become applicable to employees who perform mechanical activities for railroads, contractors, and subcontractors. This will include pre-employment drug, random, and reasonable cause/reasonable suspicion testing.

The final rule will apply to all railroads, although not all requirements will be relevant to all railroads. FRA estimates there are 744 Class III railroads, of which 704 operate on the general system. These railroads are of varying size, with some belonging to larger holding companies.

Part 219 excepts small railroads, defined as railroads with 15 or fewer covered employees and having minimal joint operations with other railroads, from random

²² 5 U.S.C. 603(a).

testing. Small railroads are also exempt from FRA reasonable cause testing. FRA is not changing this small railroad exception to account for railroads' mechanical employees.

The final rule will impose statutorily required costs related to pre-employment drug testing, random testing, reasonable suspicion testing, recordkeeping, and annual report submission. The final rule will also impose discretionary costs related to reasonable cause testing, which FRA has included in its economic analysis supporting this rule. FRA expects that the costs borne by a railroad will be proportionate to the number of employees. As such, FRA expects the costs for small entities will be much less than those borne by large entities.

As enumerated in the IRFA, the final rule will result in an average annual cost for a full compliance small railroad of \$449 in year 1 to year 3 and \$242 in year 4 to year 10. Partial compliance small railroads will have an average annual burden of approximately \$41 as they will only be subject to adding pre-employment testing.

When developing the final rule, FRA considered the impact that the final rule would have on small entities. To add clarity and narrow the scope of those employees subject to the final rule, FRA chose a definition for "mechanical employees" that listed explicit exclusions. This rule will benefit small railroads by reducing the number of employees with an SUD that remain on the payroll. FRA estimates this final rule will only minimally impact small railroads and, overall, the net benefit will be positive to small railroads.

Consistent with the findings in FRA's IRFA, and the lack of any comments received on it, the Deputy Administrator of FRA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this final rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction

Act of 1995.²³ The sections that contain the new information collection requirements are duly designated and the estimated time to fulfill each requirement is as follows:

CFR Section ²⁴	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours	Total Annual Dollar Cost Equivalent ²⁵
219.4 – Petition for recognition of a foreign railroad’s workplace testing program	1 railroad	1 petition	40 hours	40.00 hours	\$3,097.60
— Comments on petitions	1 railroad	2 comments + 2 copies	15 mins + 15 minutes	1.00 hour	\$77.44
219.7 – Waivers	734 railroads ²⁶	3 waiver letters	90 minutes	4.50 hours	\$348.48
219.12(d) – RR Documentation on need to place employee on duty for follow-up tests	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	6 documents	30 minutes	3.00 hours	\$232.32
219.23(a) – Notification to employees for testing	165,058 employees ²⁷	71,978 notices	3 seconds + 30 seconds	194.94 hours	\$15,096.15
— (c) and (e) – Educational materials	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	744 modified/revised educational documents	1 hour	744.33 hours	\$57,640.92
— Copies of educational materials to employees	165,058 employees	22,052 copies of educational material documents	2 minutes	735.07 hours	\$56,923.82
219.25(a) – Previous employer drug and alcohol checks – Employee testing records from previous employers and employee release of information (49 CFR 40.25(a) and (f))	19,058 MECH employees	7,623 reports	8 minutes	1,016.40 hours	\$78,710.02
219.104(b) – Removal of employee from regulated service – Verbal notice + follow-up written letter	734 (railroads + 44,797 MOW + (New) 19,058 MECH employees	530 verbal notices + 530 letters	30 seconds + 2 minutes	22.08 hours	\$1,709.88

²³ 44 U.S.C. 3501 *et seq.*

²⁴ The burdens under §§ 219.25(a) and 219.800(b), once approved by OMB, will fall under DOT’s part 40 information collection (OMB No. 2105-0529). Additionally, the burdens under §§ 219.603, 219.607, 219.609, 219.611, 219.1001, 219.1003, 219.1005, and 219.1007 are included under § 219.605. Furthermore, the burdens under §§ 219.12(c), 219.104(d), 219.105(a)(2)-(a)(3), 219.107(a)-(b), 219.203(a)(3)(ii), 219.300, 219.301, 219.302, 219.502, 219.503, 219.608, 219.615(g), 219.617(b)(2), 219.621, 219.701, and 219.903 are covered under DOT’s Part 40 (OMB No. 2105-0529).

²⁵ The dollar equivalent cost is derived from the 2020 Surface Transportation Board’s Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges. Also, totals may not add due to rounding.

²⁶ For purposes of this table, the respondent universe of 734 railroads includes the estimated 30 contractor companies that will be newly subject to part 219 because they perform MECH activities on behalf of these railroads.

²⁷ The respondent universe of 165,058 employees includes an estimated 19,058 MECH employees who will be newly subject to part 219. Note: The number of employees changed from 171,410 to 165,058 due to a change in the estimated number of MECH employees from 25,410 to 19,058.

219.105 – RR's duty to prevent violations - Documents provided to FRA after agency request regarding RR's alcohol and/or drug use education/prevention program	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	3 document copies	5 minutes	.25 hour	\$19.36
— RR Supervisor Rule G observations and records of regulated employees	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	330,116 observation records	2 seconds	183.40 hours	\$14,202.50
219.201(a) —Events for which testing is required—List of event (<i>Note: App on PAT testing</i>) ²⁸	Supervisors of regulated employees	500 PAT testing determinations	5 minutes	41.67 hours	\$3,226.92
—(c) Report by RR concerning decision by person other than RR representative about whether an accident/incident qualifies for testing	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	2 reports	30 minutes	1.00 hour	\$77.44
219.203/207 – Verbal notification and subsequent written report of failure to collect urine/blood specimens within four hours (revision to the current CFR, removal of written notification reports)	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	80 notifications	2 minutes	2.67 hours	\$206.76
— Recall of employees for testing and Narrative Report Completion	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	4 reports	30 minutes	2.00 hours	\$154.88
— RR reference to part 219 requirements and FRA's post-accident toxicological kit instructions in seeking to obtain facility cooperation	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	98 references	5 minutes	8.17 hours	\$632.68
— RR notification to National Response Center of injured employee unconscious or otherwise unable to give testing consent	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	2 phone calls	10 minutes	.33 hour	\$25.56
— RR notification to local authority	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	5 phone calls	10 minutes	.83 hour	\$64.28
219.205 ²⁹ – Post Accident Toxicological Testing Forms – Completion of FRA F 6180.73	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	103 forms	10 minutes	17.17 hours	\$1,329.64
— Specimen handling/collection – Completion of Form FRA F 6180.74 by train crew members after accident	165,058 employees	219 forms	15 minutes	54.75 hours	\$4,239.84

²⁸ FRA is adding the existing burden associated with the usage of FRA's PAT testing app.

²⁹ A public comment from AAR/ASLRRA asked FRA how it will notify railroads of future changes to the information otherwise contained in (former) appendices B and C. FRA will add any changes to information from these former appendices on its drug and alcohol page, at <https://railroads.dot.gov/divisions/partnerships-programs/drug-and-alcohol>, and in FRA's PAT testing app, in addition to its PAT testing kits, as appropriate. The burden associated with the review of the updated information is already covered under § 219.201(a).

— Completion of Form FRA 6180.75	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	7 forms	20 minutes	2.33 hours	\$180.44
— Documentation of chain of custody of sealed toxicology kit from medical facility to lab delivery	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	103 chain of custody documents	2 minutes	3.43 hours	\$265.62
— RR/medical facility record of kit error	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	10 written records	2 minutes	.33 hour	\$25.56
219.209(a) – Notification to NRC and FRA of accident/incident where samples were obtained	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	103 phone reports	2 minutes	3.43 hours	\$265.62
219.211(b)—Results of post-accident toxicological testing to RR MRO and RR employee	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	7 reports	15 minutes	1.75 hours	\$135.52
— MRO report to FRA of positive test for alcohol/drugs of surviving employee	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	6 reports	15 minutes	1.50 hours	\$116.16
219.303 – RR written documentation of observed signs/symptoms for reasonable suspicion determination	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	33 written documents	5 minutes	2.75 hours	\$212.96
219.305 – RR written record stating reasons test was not promptly administered	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	11 records	2 minutes	.37 hour	\$28.65
219.405 – RR documentation describing basis of reasonable cause testing	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	2,314 written documents	5 minutes	192.81 hours	\$14,931.21
219.407(b) – Prompt specimen collection time limitation exceeded – Record	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	17 records	15 minutes	4.25 hours	\$329.12
219.501 – RR documentation of negative pre-employment drug tests	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	6,400 lists	30 seconds	53.33 hours	\$4,129.88
219.605(a) – Submission of random testing plan: New RRs	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	12 plans	1 hour	12.00 hours	\$929.28
— Amendments to currently-approved FRA random testing plan	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	450 amendments	1 hour	450.00 hours	\$34,848.00
— Resubmitted random testing plans after notice of FRA disapproval of plan or amendment	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	56 resubmitted plans	30 minutes	28.00 hours	\$2,168.32

— Non-substantive amendment to an approved plan	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	300 amendments	15 minutes	75.00 hours	\$5,808.00
219.615 – Incomplete random testing collections – Documentation	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	2,250 documents	30 seconds	18.75 hours	\$1,452.00
219.617 – Employee Exclusion from random alcohol/drug testing after providing verifiable evidence from credible outside professional	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	6 documents	1 hour	6.00 hours	\$464.64
219.623 – Random testing records	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	48,977 records	1 minutes	816.28 hours	\$63,212.72
219.800 – Annual reports – Management Information System (MIS) form for MECH employees (49 CFR 40.26—MIS form submission)	38 railroads + 17 contractors	55 MIS reports	90 minutes	82.50 hours	\$6,388.80
219-1001– Co-worker referral of employee who is unsafe to work with/in violation of part 219 or railroad’s drug/alcohol rules	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	24 referrals	5 minutes	2.00 hours	\$154.88
Total	734 railroads + 44,797 MOW + (New) 19,058 MECH employees	495,744 responses	N/A	4,830 hours	\$374,064

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

For information or a copy of the paperwork package submitted to OMB, contact Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, at 202-493-0440.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them via email to Ms. Wells at Hodan.Wells@dot.gov.

OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the *Federal Register*. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA is not

authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required.

D. Environmental Impact

Consistent with the National Environmental Policy Act³⁰ (NEPA), the Council of Environmental Quality's NEPA implementing regulations at 40 CFR parts 1500–1508, and FRA's NEPA implementing regulations at 23 CFR part 771, FRA has evaluated this final rule and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.³¹ Specifically, FRA has determined that this final rule is categorically excluded from detailed environmental review pursuant to 23 CFR 771.116(c)(15), “[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.”

The purpose of this rulemaking is to expand the scope of FRA's alcohol and drug regulation to cover MECH employees who test or inspect railroad rolling equipment. This rule will not directly or indirectly impact any environmental resources and will not result in significantly increased emissions of air or water pollutants or noise. Instead, the rule will likely result in safety benefits. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.³² FRA has concluded that no such unusual circumstances

³⁰ 42 U.S.C. 4321 *et seq.*

³¹ 40 CFR 1508.4.

³² 23 CFR 771.116(b).

exist with respect to this final rule and it meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.³³ FRA has also determined that this rulemaking will not approve a project resulting in a use of a resource protected by Section 4(f).³⁴

E. Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a)³⁵ require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this final rule under Executive Order 12898 and the DOT Order and has determined it will not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

F. Federalism Implications

Executive Order 13132, “Federalism,”³⁶ requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations

³³ 16 U.S.C. 470

³⁴ Department of Transportation Act of 1966, as amended (Pub. L. 89-670, 80 Stat. 931); 49 U.S.C. 303.

³⁵ 91 FR 27534 (May 10, 2012).

³⁶ 64 FR 43255 (Aug. 10, 1999).

that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, an Agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the Agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this final rule under the principles and criteria contained in Executive Order 13132. This rule, issued under a statutory mandate, will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. FRA has determined that the rule will not impose substantial direct compliance costs on State and local governments, and that the consultation and funding requirements of Executive Order 13132 do not apply. However, this rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “essentially local safety or security hazard” exception to section 20106.

In sum, FRA has analyzed this rule under the principles and criteria in Executive Order 13132, and determined that it has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Therefore, preparation of a federalism summary impact statement is not required.

G. Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995,³⁷ each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). Section 202 of the Act³⁸ further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the Agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This rule will not result in such an expenditure, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”³⁹ FRA has evaluated this rule in accordance with Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

³⁷ Pub. L. 104-4, 2 U.S.C. 1531.

³⁸ 2 U.S.C. 1532.

³⁹ 66 FR 28355 (May 22, 2001).

Executive Order 13783, “Promoting Energy Independence and Economic Growth,” requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.⁴⁰ FRA has determined that this rule will not burden the development or use of domestically produced energy resources.

I. Tribal Consultation

FRA has evaluated this rule under the principles and criteria in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The rule will not have a substantial direct effect on one or more Indian tribes, impose substantial direct compliance costs on Indian tribal governments, or preempt tribal laws, and a tribal summary impact statement is not required.

List of Subjects in 49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

The Final Rule

For the reasons stated above, FRA amends part 219 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

1. Revise the authority citation for part 219 to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; Sec. 412, Pub. L. 110-432, 122 Stat. 4889; Sec. 8108, Div. A; Sec. 8102, Pub. L. 115-271; 132 Stat. 3894; and 49 CFR 1.89.

Subpart A—General

⁴⁰ 82 FR 16093 (Mar. 31, 2017).

2. In § 219.3, remove and reserve paragraph (b) and revise and republish paragraph (c).

The revision reads as follows:

§ 219.3 Application.

* * * * *

(c) *Small railroad exception.* (1) Subparts E, G, and K do not apply to small railroads, and a small railroad may not perform the Federal requirements authorized by those subparts. For purposes of this part, a small railroad means a railroad that:

(i) Has a total of 15 or fewer employees who are covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, or who would be subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105 if their services were performed in the United States; and

(ii) Does not have joint operations, as defined in § 219.5, with another railroad that operates in the United States, except as necessary for purposes of interchange.

(2) An employee performing only MOW or MECH activities, as defined in § 219.5, does not count towards a railroad's total number of covered employees for the purpose of determining whether it qualifies for the small railroad exception.

(3) A contractor performing MOW or MECH activities exclusively for small railroads also qualifies for the small railroad exception (i.e., is excepted from the requirements of subparts E, G, and K of this part). A contractor is not excepted if it performs MOW or MECH activities for at least one railroad that is required to be in full compliance with this part.

(4) If a contractor is subject to all of part 219 because it performs regulated service for multiple railroads, not all of which qualify for the small railroad exception, the responsibility for ensuring that the contractor complies with subparts E and G of this part

is shared between the contractor and any railroad using the contractor that does not qualify for the small railroad exception.

* * * * *

3. In § 219.5:

- a. Revise the definitions of “Category of regulated employee” and “Employee”
- b. Add in alphabetical order a definition for “Mechanical employee”;
- c. Revise the definitions of “Regulated employee” and “Regulated service”;
- d. Add in alphabetical order a definition for “Rolling equipment”; and
- e. Revise the definition of and “Side collision”.

The revisions and additions read as follows:

§ 219.5 Definitions.

* * * * *

Category of regulated employee means a broad class of covered service, maintenance-of-way, or mechanical employees (as defined in this section). For the purposes of determining random testing rates under § 219.625, if an individual performs both covered service and maintenance-of-way activities, or covered service and mechanical activities, he or she belongs in the category of regulated employee that corresponds with the type of regulated service comprising the majority of his or her regulated service.

* * * * *

Employee means any individual, (including a volunteer or a probationary employee) performing activities for a railroad, a contractor to a railroad, or a subcontractor to a railroad.

* * * * *

Mechanical employee or *MECH employee* means—

(1) Any employee who, on behalf of a railroad, performs mechanical tests or inspections required by part 215, 221, 229, 230, 232, 238, or 299 of this chapter on railroad rolling equipment, or its components, except for:

(i) An employee who is a member of a train crew assigned to test or inspect railroad rolling equipment that is part of a train or yard movement the employee has been called to operate; or

(ii) An employee who only performs one or more of the following duties:

(A) Cleaning and/or supplying cabooses, locomotives, or passenger cars with ice, food concession items, drinking water, tools, sanitary supplies, or flagging equipment;

(B) Servicing activities on locomotives such as fueling, replenishing engine oils and engine water, sanding, and toilet discharge and recharge;

(C) Checking lading for pilferage or vandalism; or

(D) Loading, unloading, or shifting car loads.

(2) An employee who only performs work related to the original manufacturing, testing, or inspection of railroad rolling equipment, or its components, on the manufacturer's behalf, is not a mechanical employee or MECH employee.

* * * * *

Regulated employee means a covered employee, maintenance-of-way employee, or mechanical employee (as defined in this section) who performs regulated service for a railroad subject to the requirements of this part.

Regulated service means activities a covered employee, maintenance-of-way employee, or mechanical employee (as defined in this section) performs that makes such an employee subject to this part.

* * * * *

Rolling equipment means locomotives, railroad cars, and one or more locomotives coupled to one or more railroad cars.

Side collision means a collision when one consist strikes the side of another consist at a turnout, including a collision at a switch or at a railroad crossing at grade.

* * * * *

4. Revise and republish § 219.10 to read as follows:

§ 219.10 Penalties.

Any person, as defined by § 219.5, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$919 and not more than \$30,058 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$120,231 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., § 219.105, which is construed to qualify the responsibility of a railroad for the unauthorized conduct of a regulated employee that violates § 219.101 or § 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See FRA's website at www.fra.dot.gov for a statement of agency civil penalty policy.

5. In § 219.11, revise paragraph (g) to read as follows:

§ 219.11 General conditions for chemical tests.

* * * * *

(g) Each supervisor responsible for regulated employees (except a working supervisor who is a co-worker as defined in § 219.5) must be trained in the signs and symptoms of alcohol and drug influence, intoxication, and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol, the major drug groups on the controlled

substances list, and other impairing drugs. The program must also provide training on the qualifying criteria for post-accident toxicological testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C.

* * * * *

6. In § 219.23, revise the first sentence of paragraph (a) introductory text and revise paragraphs (c)(2) and (d)(2) to read as follows:

§ 219.23 Railroad policies.

(a) Whenever a breath or body fluid test is required of a regulated employee under this part, the railroad (either through a railroad employee or a designated agent, such as a contracted collector) must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations and is being conducted under Federal authority. * * *

* * * * *

(c) * * *

(2) For a minimum of three years after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, also ensuring that a hard copy of these materials is provided to each mechanical employee.

(d) * * *

(2) The specific classes or crafts of employee who are subject to the provisions of this part, such as engineers, conductors, MOW employees, MECH employees, signal maintainers, or train dispatchers;

* * * * *

Subpart C—Post-Accident Toxicological Testing

7. In § 219.203, revise paragraphs (a) introductory text and (d)(1) to read as follows:

§ 219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* A regulated employee subject to post-accident toxicological testing under this subpart must cooperate in the provision of specimens as described in this part.

* * * * *

(d) * * *

(1) A railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident, preferably within four hours. Specimens that are not collected within four hours after a qualifying accident or incident must be collected as soon thereafter as practicable. If a specimen is not collected within four hours of a qualifying event, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202-493-6313 and provide detailed information regarding the failure (either in conversation or via a voicemail).

* * * * *

8. In § 219.205, revise paragraphs (a) and (c)(1), the first sentence of paragraph (c)(2), paragraph (d), and the first sentence of paragraph (e) to read as follows:

§ 219.205 Specimen collection and handling.

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart and the instructions provided inside the FRA post-accident toxicological shipping kit.

* * * * *

(c) * * *

(1) FRA makes available for purchase a limited number of standard shipping kits for the purpose of routine handling of post-accident toxicological specimens under this subpart. Specimens must be placed in the shipping kit and prepared for shipment according to the instructions provided in the kit.

(2) Standard shipping kits may be ordered by requesting an order form from FRA's Drug and Alcohol Program Manager at 202-493-6313. * * *

(d) *Shipment.* Specimens must be shipped as soon as possible by pre-paid air express (or other means adequate to ensure delivery within 24 hours from time of shipment) to FRA's post-accident toxicological testing laboratory. However, if delivery cannot be ensured within 24 hours due to a suspension in air express delivery services, the specimens must be held in a secure refrigerator until delivery can be accomplished. In no circumstances may specimens be held for more than 72 hours. Where express courier pickup is available, the railroad must ask the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the specimens are collected or if for any other reason a prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the specimens to the most expeditious point of shipment via air express. The railroad must maintain and document a secure chain of custody of the kit(s) from its release by the medical facility to its delivery for transportation.

(e) *Specimen security.* After a specimen kit or transportation box has been sealed, no entity other than FRA's post-accident toxicological testing laboratory may open it. * * *

9. Revise § 219.206 to read as follows:

§ 219.206 FRA access to breath test results.

Documentation of breath test results must be made available to FRA consistent with the requirements of this subpart.

10. In § 219.207, revise paragraphs (c) and (d) to read as follows:

§ 219.207 Fatality.

* * * * *

(c) A coroner, medical examiner, pathologist, or other qualified professional is authorized to remove the required body fluid and tissue specimens from the remains on request of the railroad or FRA pursuant to this part; and in so acting, such person is the delegate of the FRA Administrator under sections 20107 and 20108 of title 49, United States Code (but not the agent of the Secretary for purposes of the Federal Tort Claims Act (chapter 71 of Title 28, United States Code)). A qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under this part.

(d) The instructions included inside the shipping kits specify body fluid and tissue specimens required for toxicological analysis in the case of a fatality.

11. In § 219.211, revise paragraphs (a), (c), (e), and (i) to read as follows:

§ 219.211 Analysis and follow-up.

(a) Specimens are analyzed for alcohol, controlled substances, and non-controlled substances specified by FRA under protocols specified by FRA. These substances may be tested for in any form, whether naturally or synthetically derived. Specimens may be analyzed for other impairing substances specified by FRA as necessary to the particular accident investigation.

* * * * *

(c) With respect to a surviving employee, a test reported as positive for alcohol or a controlled substance must be reviewed by the railroad's Medical Review Officer (MRO) with respect to any claim of use or administration of medications (consistent with § 219.103) that could account for the laboratory findings. The MRO must promptly report the results of each review by email to FRA-MROletters.email@dot.gov. The report must reference the employing railroad, accident/incident date, and location; and state whether the MRO reported the test result to the employing railroad as positive or

negative and the basis of any determination that analytes detected by the laboratory derived from authorized use (including a statement of the compound prescribed, dosage/frequency, and any restrictions imposed by the authorized medical practitioner). Unless specifically requested by FRA in writing, the MRO may not disclose to FRA the underlying physical condition for which any medication was authorized or administered. The FRA is not bound by the MRO's determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

* * * * *

(e) An employee may respond within 45 days of receipt of his or her test results prior to the preparation of any final investigative report concerning the accident or incident by email to FRA-DrugAlcoholProgram.email@dot.gov. The employee's response must state the accident date, railroad, and location; the position the employee held on the date of the accident/incident; and any information the employee requests be withheld from public disclosure. FRA will decide whether to honor the employee's request to withhold information.

* * * * *

(i) An employee may, within 60 days of receipt of the toxicology report, request a retest of his or her PAT testing specimen. A request for retest must be emailed to FRA-DrugAlcoholProgram.email@dot.gov. The employee's request must specify the railroad, accident date, and location. Upon receipt of the employee's request, FRA will identify and select a qualified referee laboratory that has available an appropriate, validated assay for the specimen type and analyte(s) declared positive. Because some analytes may deteriorate during storage, if the referee laboratory detects levels above its Limit of Detection (as defined in 49 CFR 40.3), FRA will report the retest result as corroborative of the original PAT test result.

Subpart E—Reasonable Cause Testing

12. In § 219.403, revise the introductory text, revise and republish paragraph (b)(1), revise paragraphs (b)(17) and (18), and add paragraphs (b)(19) through (22) to read as follows:

§ 219.403 Requirements for reasonable cause testing.

Each railroad's decision process regarding whether reasonable cause testing is authorized must be completed before the reasonable cause testing is performed and documented according to the requirements of § 219.405. The following circumstances constitute reasonable cause for the administration of alcohol and/or drug tests under the authority of this subpart. For reasonable cause testing based on a rule violation as authorized in paragraph (b) of this section, a railroad that elects to test under FRA authority may only use the rule violations listed in paragraph (b) of this section as bases for reasonable cause testing.

* * * * *

(b) * * *

(1) Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable, signal indication, special instruction or other directive with respect to movement of railroad on-track equipment that involves—

(i) Occupancy of a block or other segment of track to which entry was not authorized;

(ii) Failure to clear a track to permit opposing or following movements to pass;

(iii) Moving across a railroad crossing at grade without authorization;

(iv) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required); or

(v) Failure to take appropriate action, resulting in the enforcement of a positive train control system.

* * * * *

(17) Improper use of individual train detection in a manual interlocking or control point;

(18) Failure to apply three point protection (fully apply the locomotive and train brakes, center the reverser, and place the generator field switch in the off position) that results in a reportable injury to a regulated employee;

(19) Failure to display blue signals in accordance with § 218.25 through § 218.30 of this chapter;

(20) Failure to perform a required brake test, or having knowledge that a required brake test was not performed, pursuant to the Class I, Class IA, Class II, or Class III, or transfer train brake test provisions of part 232, or the running brake test provisions of part 238, of this chapter;

(21) Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or permitting a train to be operated with an unauthorized disabled safety device in the controlling locomotive; or

(22) Failure to have a derailing device in proper position and locked if required in accordance with § 218.109 of this chapter.

Subpart F—Pre-Employment Tests

13. In § 219.501, revise paragraph (e) and add paragraph (f) to read as follows:

§ 219.501 Pre-employment drug testing.

* * * * *

(e)(1) The pre-employment drug testing requirements of this section do not apply to:

(i) Covered employees of railroads qualifying for the small railroad exception (see § 219.3(c)) who were performing regulated service for the qualifying railroad, or a contractor or subcontractor of a qualifying railroad, before June 12, 2017;

(ii) Maintenance-of-way employees who were performing regulated service for a railroad, or a contractor or subcontractor of a railroad, before June 12, 2017; or

(iii) MECH employees who were performing regulated service for a railroad, or contractor or subcontractor of a railroad, before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

(2) An exempted employee under paragraph (e)(1) of this section must have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad:

(i) On or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and

(ii) On or after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** for MECH employees.

(f) A railroad, or contractor or subcontractor of a railroad, must comply with 49 CFR 40.25 by performing a records check on any of its MOW or MECH employees who have been exempted from pre-employment testing before the employee first performs regulated service. An employee may not perform regulated service after 30 days from the date on which the employee first performed regulated service, unless this information has been obtained or a good faith effort to obtain this information has been made and documented.

Subpart G—Random Alcohol and Drug Testing Programs

14. In § 219.605, revise and republish paragraphs (a) and (e) to read as follows:

§ 219.605 Submission and approval of random testing plans.

(a) *Plan submission.* (1) Each railroad must submit for review and approval a random testing plan meeting the requirements of §§ 219.607 and 219.609 by email to FRA-DrugAlcoholProgram.email@dot.gov. The submission must include the name of the railroad or contractor in the subject line. A railroad commencing start-up operations

must submit its plan no later than 30 days before its date of commencing operations. A railroad that must comply with this subpart because it no longer qualifies for the small railroad exception under § 219.3 (due to a change in operations or its number of covered employees) must submit its plan no later than 30 days after it becomes subject to the requirements of this subpart. A railroad may not implement a Federal random testing plan or any substantive amendment to that plan before FRA approval.

(2) A railroad may submit separate random testing plans for each category of regulated employees (as defined in § 219.5), combine all categories into a single plan, or amend its current FRA-approved plan to add additional categories of regulated employees, as defined by this part.

* * * * *

(e) *Previously approved plans.* A railroad is not required to resubmit a random testing plan that FRA had approved before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, unless the railroad must amend the plan to comply with the requirements of this subpart. A railroad must submit new plans, combined plans, or amended plans incorporating new categories of regulated employees (i.e., mechanical employees) for FRA approval at least 60 days after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

15. Revise § 219.607 by redesignating paragraphs (c)(3) through (14) as (c)(4) through (15), adding new paragraph (c)(3), and revising newly redesignated paragraphs (c)(7), (9), and (14) to read as follows:

§ 219.607 Requirements for random testing plans.

* * * * *

(c) * * *

(3) Total number of mechanical employees, including mechanical contractor employees and volunteers;

* * * * *

(7) Name, address, and contact information for any service providers, including the railroad's Medical Review Officers (MROs), Substance Abuse and Mental Health Services Administration (SAMHSA) certified drug testing laboratory(ies), Drug and Alcohol Counselors (DACs), Substance Abuse Professionals (SAPs), and Consortium/Third Party Administrators (C/TPAs) or collection site management companies. Individual collection sites do not have to be identified;

* * * * *

(9) Target random testing rates meeting or exceeding the minimum annual random testing rates;

* * * * *

(14) Designated testing window. A designated testing window extends from the beginning to the end of the designated testing period established in the railroad's FRA-approved random plan (see § 219.603), after which time any individual selections for that designated testing window that have not been collected are no longer active; and

* * * * *

16. In § 219.615, revise the first sentence of paragraph (e)(3) to read as follows:

§ 219.615 Random testing collections.

* * * * *

(e) * * *

(3) A railroad must inform each regulated employee that he or she has been selected for random testing at the time the employee is notified. * * *

* * * * *

17. In § 219.617, revise the first sentence of paragraph (a)(3) to read as follows:

§ 219.617 Participation in random alcohol and drug testing.

(a) * * *

(3) A railroad may excuse a regulated employee who has been notified of his or her selection for random testing only if the employee can substantiate that a medical emergency involving the employee or an immediate family member (e.g., birth, death, or medical emergency) supersedes the requirement to complete the test. * * *

* * * * *

18. In § 219.625, revise paragraph (c)(1) to read as follows:

§ 219.625 FRA Administrator's determination of random alcohol and drug testing rates

* * * * *

(c) * * *

(1) These initial testing rates are subject to amendment by the Administrator in accordance with paragraphs (d) and (e) of this section after at least two consecutive calendar years of MIS data have been compiled for the category of regulated employee.

* * * * *

Subpart I—Annual Report

19. In § 219.800, revise the first sentence of paragraph (a), revise paragraph (f), and add paragraph (g) to read as follows:

§ 219.800 Annual reports.

(a) Each railroad that has a total of 400,000 or more employee hours (including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States), must submit to FRA by March 15 of each year a report covering the previous calendar year (January 1-December 31), summarizing the results of its alcohol misuse and drug abuse prevention program. * * *

* * * * *

(f) A railroad required to submit an MIS report under this section must submit separate reports for covered employees, MOW employees, and MECH employees.

(g)(1) This subpart does not apply to any contractor that performs regulated service exclusively for railroads with fewer than 400,000 total employee annual work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(2) When a contractor performs regulated service for at least one railroad with 400,000 or more total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States, this subpart applies as follows:

(i) A railroad with 400,000 or more total employee annual work hours must comply with this subpart regarding any contractor employees it integrates into its own alcohol and drug program under this part; and

(ii) If a contractor establishes an independent alcohol and drug testing program that meets the requirements of this part and is acceptable to the railroad, the contractor must comply with this subpart if it has 200 or more regulated employees.

Appendix B to Part 219—[Removed]

20. Remove appendix B to part 219.

Appendix C to Part 219—[Removed]

21. Remove appendix C to part 219.

Issued in Washington, D.C.

Amitabha Bose,
Administrator.

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